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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LARRY LANG, Defendant and Appellant.	E053827 (Super.Ct.No. SWF1100012) OPINION

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Larry Lang pleaded guilty to conspiracy to commit the crimes of second degree burglary and vandalism (Pen. Code, § 182, subd. (a)(1), count 1),[1] burglary (§ 459, count 2), felony vandalism (§ 594, subd. (b)(1), count 3), and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a), count 4). He also admitted that he had suffered five prior prison terms. (§ 667.5, subd. (b).) In return, defendant was sentenced to a total term of three years in state prison with credit of 184 days for time served. On appeal, defendant contends that the trial court violated his constitutional rights to due process by failing to allow allocution at the sentencing hearing. We reject this contention and affirm the judgment.

DISCUSSION[2]

While acknowledging that our Supreme Court in *People v. Evans* (2008) 44 Cal.4th 590 (*Evans*), "rejected a claim that the federal due process clause protected the right of allocution," defendant, nonetheless, argues that the trial court erred in violating his due process rights at the sentencing hearing by failing to allow allocution. He insists that *Evans* is not controlling because "[t]he defendant in *Evans* did not make a due process claim based on the broad premise that due process protects those rights rooted in the common law, but simply a due process claim based 'on the opportunity to be heard "at a meaningful time and in a meaningful manner."'"

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The details of defendant's criminal conduct are not relevant to the limited legal issue raised in this appeal. Those details are set out in the parties' briefs, and we will not recount them here.

The People argue that defendant forfeited this issue by failing to ask to address the trial court; that his claim fails on the merits pursuant to *Evans*; and that any error was harmless because there is no evidence to suggest he would have received a lesser sentence had he made a statement. We agree with the People.

Defendant was immediately sentenced following his guilty pleas and admission. Prior to sentencing, the trial court inquired: "Turning to the issue of sentence and pronouncing judgment, is there any legal cause?" Defense counsel responded, "None." The following colloquy thereafter occurred between the trial court and the parties:

"THE COURT: Waive referral and time of this case?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: Submit on the issue?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: People?

"[THE PROSECUTOR]: People submit as well.

"THE COURT: Would the store owner want to say anything on this case?

"[THE PROSECUTOR]: No, your Honor."

The trial court thereafter sentenced defendant to a total term of three years in state prison with credit for time served. Neither defendant nor his counsel indicated defendant wished to address the court.

"Allocution" refers to the court's "*inquiry of a defendant* as to whether there is any reason why judgment should not be pronounced." (*Evans*, *supra*, 44 Cal.4th at p. 593, fn. 2.) The Ninth Circuit has ruled that denying defendants the opportunity to speak at

their sentencing hearing amounts to a denial of due process subject to harmless error analysis. (*Boardman v. Estelle* (9th Cir.1992) 957 F.2d 1523, 1525, 1530, superseded by statute on another ground as stated in *Rikard v. Harrington* (E.D. Cal. Oct. 16, 2009) 2009 U.S. Dist. Lexis 96959.)

In *Evans*, *supra*, 44 Cal.4th 590, our Supreme Court held that, under sections 1200 and 1201, a defendant has a statutory right to state reasons why judgment should not be pronounced at all, but not to state reasons why a more lenient judgment should be pronounced. (*Evans*, at p. 597.) In addition, under section 1204, a defendant does have a statutory right to state why a more lenient judgment should be pronounced, but only under oath and subject to cross-examination. (*Evans*, at p. 598.) The court added that there is no federal due process right to address the court at sentencing other than under oath and subject to cross-examination. (*Id*. at p. 600.)

In *Evans* itself, at sentencing, after discussing the appropriate sentence, defense counsel stated, "'Submitted.'" (*Evans*, *supra*, 44 Cal.4th at p. 593.) During the pronouncement of judgment, the defendant asked, "'Can I speak, your honor?'" (*Ibid*.) The trial court replied, "'No.'" (*Ibid*.) The Supreme Court noted, "Defense counsel made no attempt to call defendant to testify, and defendant himself did not ask to do so." (*Id*. at p. 600.) It concluded, "Under these circumstances, there was a forfeiture of defendant's right to testify in mitigation of punishment." (*Ibid*.)

Finally, the court stated: "It was only after the trial court had denied probation and was in the process of sentencing defendant to prison that defendant asked, 'Can I speak, your honor?' Assuming for the sake of argument that this may be construed as a request

to testify in mitigation of punishment, it came too late; it should have been made before the court started to pronounce defendant's sentence. [Citations.]" (*Evans*, *supra*, 44 Cal.4th at p. 600.)

Here, like in *Evans*, defendant never sought leave to speak before the trial court began to pronounce sentence. At the time of sentencing, defense counsel answered "[n]one" when the trial court asked if there was "any legal cause" why judgment should not be pronounced. Defense counsel made no attempt to call defendant to testify in mitigation of punishment, and defendant did not ask to do so. Indeed, as the People point out, this case presents a stronger case for forfeiture than *Evans*, where, as noted above, the defendant in *Evans* asked to speak to the trial court. (*Evans*, *supra*, 44 Cal.4th at pp. 593, 600.) Therefore, under these circumstances, any right defendant may have had to make a statement was forfeited. (*Id*. at pp. 598-599.)

In any event, defendant's claim also fails on the merits. Defendant purports to distinguish *Evans* as failing to consider the component of due process that "protects those rights rooted in the common law." We find this argument unpersuasive.

The court in *Evans* traced the right of allocution to the common law. (*Evans*, *supra*, 44 Cal.4th at pp. 595-597.) The right existed in a time where a defendant could not be represented and could not testify at trial. Allocution was the opportunity for the defendant to seek mitigation of the harsh punishments of the time. The court looked to section 1204 for guidance and concluded that a defendant wishing to make an oral statement in mitigation must do so through testimony under oath. (*Evans*, *supra*, 44 Cal.4th at p. 598.)

The *Evans* court also addressed whether the federal due process rights entitle a defendant to make a personal statement in mitigation of punishment. The court held: "It is unclear whether, in this argument, [the defendant] claims to have a right under the federal Constitution to make an *unsworn* personal statement *without being subject to cross-examination*. If that is defendant's argument, we reject it. 'The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."' [Citation.] California law, through section 1204, gives a criminal defendant the right at sentencing to make a *sworn* personal statement in mitigation that is *subject to cross-examination* by the prosecution. This affords the defendant a meaningful opportunity to be heard and thus does not violate any of the defendant's rights under the federal Constitution." (*Evans, supra,* 44 Cal.4th at p. 600.)

Moreover, the United States Supreme Court has ruled that a failure to ask a defendant appearing with counsel whether he has any remarks bearing on sentencing does not implicate any constitutional concerns. (*Hill v. United States* (1962) 368 U.S. 424, 428.) Therefore, we reject defendant's claim of constitutional error.

In any event, the deprivation of this right—if any exists—can be found harmless. (*Boardman v. Estelle, supra,* 957 F.2d at p. 1530.) Admittedly, *Evans* held only that there is no federal constitutional right "to make an *unsworn* personal statement *without being subject to cross-examination*." (*Evans, supra,* 44 Cal.4th at p. 600.) It did not directly address whether there is a federal constitutional right to make a sworn personal statement. Nevertheless, given the holding of *Evans*, an erroneous refusal to allow a

defendant to testify at sentencing is just a species in the genus of the erroneous exclusion of evidence.

It has been held that "[t]he complete exclusion of defense evidence . . . '"theoretically could rise to [the] level"' [citation] of a due process violation. But short of a total preclusion of defendant's ability to present a mitigating case to the trier of fact, no due process violation occurs; even '"[i]f the trial court misstepped, '[its] ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.'"' [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 452-453, quoting *People v. Boyette* (2002) 29 Cal.4th 381, 428.) Here, there is no evidence to suggest that the trial court completely excluded the defense evidence.

Accordingly, the error asserted here must be deemed harmless unless it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) This same standard has been applied in the past to the denial of an opportunity to address the court at sentencing. (*People v. Thomas* (1955) 45 Cal.2d 433, 438.) In general, such a denial has been held harmless if the defendant was represented by counsel who was free to assert reasons why a more lenient judgment should be imposed. (*Id.* at pp. 438-439.) That was the case here.

Defendant has not shown that making a personal statement to the trial court would have resulted in a more favorable sentence. After noting defendant was statutorily ineligible for probation, the trial court weighed the aggravating and mitigating factors.

The trial court found two factors in aggravation: (1) defendant had served prior prison terms (Cal. Rules of Court, rule 4.421(b)(3)); and (2) his convictions were numerous (Cal. Rules of Court, rule 4.421(b)(2)). The trial court also found two factors in mitigation: (1) defendant was under the influence at the time of the commission of the current offenses (Cal. Rules of Court, rule 4.423(b)(2)); and (2) he had acknowledged wrongdoing at an early stage of the proceedings (Cal. Rules of Court, rule 4.423(b)(3)). The trial court concluded by stating, "When I look at all these factors, coupled with the willingness to resolve this case at an early stage of the disposition and acknowledging guilt, I do think the middle term is appropriate because of the balance of his criminal history. It's just too extensive of a history for me to impose the low term on the case." The trial court thereafter imposed the middle term of two years on count 1, plus one year for the most recent prior prison term, for a total term of three years in state prison. Counts 2 and 3 were stayed pursuant to section 654, and a concurrent term of 180 days was ordered for count 4. The trial court struck four of defendant's five prior prison terms due to defendant's "de minimis conduct" in this case. There is nothing in the record indicating that defendant would have convinced the trial court to impose a more lenient sentence had he made a personal statement.

We conclude that any putative error was harmless.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

KING
J.